

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELWOOD SMALL, :
Plaintiff, :
v. : Case No. 3:08-cv-44-KRG-KAP
JOSEPH W. VISINSKY, ANNETTE :
KOWALEWSKI, FRED R. MAUE, M.D., :
and RICHARD ELLERS, :
Defendants :

Report and Recommendation

Plaintiff's motion for reconsideration, docket no. 54, should be denied.

Plaintiff's motion makes the same argument plaintiff has made repeatedly throughout this case, that defendant Visinsky's deliberate indifference can be inferred from (1) the fact that in an August 4, 2006 email from Debra Younkin to Joan Trees, Younkin states that Visinsky stated that someone at S.C.I. Laurel Highlands told Visinsky that plaintiff "didn't need PT," and (2) plaintiff's claim that no one ever actually told Visinsky that. Plaintiff does not even try to point to any place in the record which supports the second point. To the contrary, plaintiff implies (and in prior objections, e.g. docket no. 50 at 2-3, has expressly asserted) that defendant Visinsky has the burden of proving the identity and truthfulness of the person who told him that plaintiff did not need physical therapy. However, it is plaintiff's burden to prove defendant's deliberate indifference. Plaintiff's attempt to do so entirely on his ipse dixit that Visinsky lied is adequate to state a claim, as Judge Gibson pointed out, docket no. 51, but inadequate to withstand a motion for summary judgment.

Pursuant to 28 U.S.C. § 636(b)(1), the parties are given notice that they have ten days to serve and file written objections to this Report and Recommendation.

DATE: _____

June 22, 2007

KEITH A. PESTO

Keith A. Pesto,
United States Magistrate Judge

Notice by ECF to counsel of record and by U.S. Mail to:

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